

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PROFILE PRODUCTS LLC,

Plaintiff,

v.

ENCAP, LLC,

Defendant.

ORDER

09-cv-92-slc

This is a patent infringement suit. Defendant Encap, LLC has filed a motion requesting construction of five claim terms from United States Patent 6,349,499, dkt. 22, and plaintiff has opposed those constructions, dkt. 25. Now before the court is defendant's motion to strike plaintiff's opposition brief or in the alternative for leave to file a reply brief. For the reasons provided below, I am denying defendant's motion to strike and granting their alternative motion for leave to file a reply brief. It may have until June 18, 2009 in which to file a reply in response to plaintiff's brief in opposition.

The court's procedure regarding claims construction was laid out in the Preliminary Pretrial Conference Order. Dkt. 18, at 2. Pursuant to that order, the parties were required to exchange all terms they wanted construed and their proposed constructions by May 11, 2009; file motions requesting construction of claim terms by May 22, 2009; and file "any objections to an opponent's motion requesting claims construction" by June 3, 2009. *Id.* Plaintiff did not file its own motion requesting construction of claim terms, but did file a brief in opposition to defendant's motion requesting claims construction. In their opposition brief, plaintiff objected to defendant's proposed constructions, but also proposed its own constructions and provided arguments in support of those proposed constructions.

Defendant has moved to strike plaintiff's opposition brief or allow defendant an opportunity to reply to it, arguing that, because plaintiff did not file an opening brief, defendant was not given an opportunity to respond to plaintiff's arguments. This problem was made worse, defendant says, by plaintiff's decision to alter some of the proposed constructions it exchanged with defendant initially. Plaintiff disagrees, arguing that it proposes only "responsive constructions," using the claim language to propose those constructions, and has made changes to the proposed construction it exchanged only for the sake of simplicity or readability.

The parties' disagreement on this matter illustrates the problem: while plaintiff thinks its "responsive constructions" were innocent and its modifications harmless, defendant appears to believe otherwise and would like to criticize them. In the adversarial system, there can be no such thing as "innocent" tweaks, just as there can be no such thing as a "responsive construction" that does nothing more than object to plaintiff's construction. The only objection available to a party who does not file opening briefs is the following: "no construction necessary." Plaintiff may *think* that his proposed constructions were nothing more than that, but they were. They were arguments that "if *some* construction is necessary, here's what it should be." That is what is not available to a party who declines to file an opening brief. Otherwise, the other party is left without an opportunity to respond, as is the case here.

Thus, I agree with defendant that plaintiff's opposition brief goes beyond merely objecting to defendant's proposed constructions, and that it would be unfair to allow plaintiff to have the only word on its proposed constructions. However, I do not agree that the situation warrants striking plaintiff's opposition brief and thereby disregarding plaintiff's position on the

construction of claim terms. There is time in the schedule for defendant to submit a reply brief. Therefore, I will deny defendant's motion to strike plaintiff's opposition brief but grant its motion for leave to file a reply brief. Defendant may have until June 18, 2009 in which to file a reply brief opposing plaintiff's proposed constructions. As plaintiff points out, that reply brief should not raise new arguments; it is limited to challenging plaintiff's proposed constructions.

ORDER

IT IS ORDERED that defendant's motion to strike plaintiff's brief in opposition to defendant's motion requesting claims construction, dkt. 28, is DENIED, and its motion for leave to file a brief in reply to plaintiff's opposition brief, dkt. 28, is GRANTED. Defendant may have until June 18, 2009 in which to file a reply brief opposing plaintiff's proposed constructions.

Entered this 15th day of June, 2009.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge